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No. 84-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., et al.,
Petitioners

v.

DEPARTMENT OF ENERGY, et al.,
Respondents

BRIEF OF RESPONDENTS PHILADELPHIA ELECTRIC COMPANY, GERALDINE H. SWEENEY, RJG CAB INC., AND NATIONAL FREIGHT, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I.

COUNTERSTATEMENT OF THE CASE

A. The Challenged Legislation, Congressional Intent, and the Legislative Vetoes

The central facts which distinguish the instant situation from that addressed by the Court in *Immigration and Naturalization Service v. Chadha,* 103 S. Ct. 2764 (1983), the case upon which Petitioners rely, and which make its ruling inapplicable are:

1. The statutory provisions Petitioners seek to invalidate, which mandated the promulgation by the President of price controls on the first sale of domestic crude oil, were not subject to legislative veto. Emergency Petroleum Allocation Act of 1973, Section 4(a), Pub. L. No. 93-159, 87 Stat. 627 (1973) (hereinafter cited as "EPAA"), *as amended by* the Energy Policy and Conservation Act, Section 401, Pub. L. No. 94-163, 89 Stat. 871 (1975) (hereinafter cited as "EPCA"). It is those mandated price controls which the Petitioners violated, and which have been upheld as a valid exercise of the statutory mandate. *In re Department of Energy Stripper Well Exemption Litigation,* 520 F. Supp. 1232 (D. Kan. 1981), *rev'd,* 690 F.2d 1375 (Temp. Emer. Ct. App. 1982), *cert. denied,* 459 U.S. 1127 (1983). The President had the power to promulgate and amend the mandatory price regulations without any possibility of legislative veto, and subject only to the requirement that such regulations be consistent with the statutory mandate. *Consumers Union v. Sawhill,* 525 F.2d 1068 (Temp. Emer. Ct. App. 1975). The only presidential powers which were both subject to legislative veto and had some possible impact on crude producers, were (i) the power to temporarily suspend the mandatory price controls for ninety (90) days (EPAA, Section 4(g)(2) *infra*) and, after its elimination the more limited power to increase the price ceiling to offset inflation

and create production incentives. (EPCA, Section 401(a)).

2. It was the clear unconditional intent of Congress at all time to mandate price regulation of crude oil. As Petitioners themselves acknowledge, such was the reason for the enactment of the EPAA. (Petition for Writ of Certiorari, at 19, hereinafter cited as "Petition"). The only concession to the President's opposition was the right to propose temporary ninety day decontrol, and it is that power which was coupled with, and subject to, the legislative one-house veto. EPAA Section 4(g)(2). Moreover, when the EPAA was continued, by means of the EPCA, even that power to decontrol for ninety days was eliminated (EPCA, Section 455) and the President given the right only to propose additional (to that provided by statute) ceiling price increases to meet inflation and provide production incentives, and that power was coupled with and subject to legislative veto (EPCA, Section 401(a)).

3. The only Presidential Actions legislatively vetoed were two proposals for new legislation. Although ostensibly submitted under the President's right to propose temporary decontrol for not more than ninety days, the actions were clearly not proposals under EPAA Section 4(g)(2). Instead, they were proposals to revamp the statutory scheme, to wit, to end unchanging fixed ceilings on the price of domestic crude oil and substitute a legislative program combining (i) a gradual increase in the ceiling price to affect decontrol, first over thirty and then over thirty-nine months, and (ii) a windfall profits tax with a provision to provide rebates to consumers adversely affected by such decontrol. 40 Fed. Reg. 30,030, 30,035-36 (1975); 40 Fed. Reg. 31,741 (1975); Veto of a Petroleum Price Review Bill II Pub. Papers of President Ford, 1007 (July 21, 1975); Appendix I to the Petition, pp. 312a *et seq.*

The circumstances under which these Presidential proposals were made and under which the legislative ve-

toes were exercised were that the EPAA, as extended, was expiring with Congress desiring to extend it and the President desiring decontrol (Petition, at 20). The President's proposals were, accordingly, a proposal of compromise legislation, made ostensibly under the EPAA decontrol provisions so as to obtain, as they indeed did, an immediate Congressional response. 121 Cong. Rec. 23,983-84,25,881-82 (1975). When Congress rejected them, the President and Congress agreed by legislation, duly enacted and signed, first for a continuation of the fixed unchanging ceiling prices without decontrol until new legislation could be passed, Emergency Petroleum Allocation Act Extension, Pub. L. No. 94-99, 89 Stat. 481 (1975), and then to a continuation of fixed price ceilings on the sale of crude oil for the period over which the President had proposed its total decontrol, with a very limited inflation and incentive related increase in ceiling price over that period. EPCA, Section 401(a).

B. Identification of Respondent End Users

The respondents[1] are end users of oil products seek-

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1. Intervenor Philadelphia Electric Company, granted intervention by the District Court on April 7, 1983, is an investor-owned public utility providing electricity, steam and gas to customers in Pennsylvania and Maryland. It seeks to be certified as class representative of all investor-owned electric, gas and steam generating public utilities using oil products for the generation of electricity, steam and gas throughout the United States. Such utilities consumed seven (7%) to eight (8%) percent of all oil products in the United States.

Intervenor National Freight, Inc. granted intervention by the District Court on April 7, 1983, is a corporation engaged in the business of hauling freight interstate by truck, and consumed oil products, principally diesel fuel, to power its trucks. It seeks to be certified as class representative of all trucking companies and other commercial users of diesel fuel and motor oils for use in motor vehicles. Intervenors RJG Cab Inc., a taxicab company, and Geraldine H. Sweeney, an automobile owner, were granted intervention by Judge Theis on July 20, 1984, and will seek certification as class representatives of all commercial and non-commercial surface transportation users of oil products, including gasoline and diesel fuel.

(Continued)

ing to act on behalf of surface transportation and utility end users of oil products, who in the aggregate consumed during the relevant period approximately fifty (50%) percent of all oil products in the United States. Accordingly, they assert a claim to fifty (50%) percent of the fund paid into Court, or due so to be paid, to the extent to which the fund is properly returned to end user consumers. They argue for, and have proposed in specific terms to the Office of Hearings and Appeals of the Department of Energy (OHA), to whom the matter has been referred by Judge Theis, an alternative method of distribution of the fund to that proposed by the States and the Refiners, and are participating in the current proceedings before OHA. *See*, Memorandum and Order of Referral for Fact Finding to Administrative Agency, MDL 378 (D. Kan. September 14, 1983).

II.

SUMMARY OF ARGUMENT

Petitioners seek a writ of certiorari for the purpose of obtaining an extension of the principle of *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983) to invalidate provisions of statutes (EPAA and EPCA) not subject to complained-of legislative vetoes. They further seek to justify the grant of certiorari on the basis that this is an appropriate case in which the Court may determine the retroactive effect of *Chadha*.

Indeed, unless this Court is prepared to so extend the *Chadha* in a manner inconsistent with the rule of *Chadha*, the issue of retroactivity will not and cannot be

FOOTNOTE ONE *(Continued)*

Surface transportation accounted for more than forty (40%) percent of the oil product consumption in the United States during the period of regulation, 1973 through 1981.

The Court has deferred action on the petitions for class certification, pending the report of OHA pursuant to the referral to it. (Memorandum and Order of Referral, *infra*).

reached by the Court since there will be no invalidation of the portion of the statute which Petitioners seek to have invalidated retroactively.

Accordingly, the instant case is an entirely inappropriate one in which to deal with the retroactivity issue as well as an inappropriate one in which to further define the scope of the rule enunciated by the Court in *Chadha*.

Application of *Chadha* to the instant situation even on a prospective basis would require the Court to ignore the intent of Congress — which was to impose mandatory price controls on crude oil — solely because the statute provided the President the ability to propose limited relief from such controls, subject to a legislative veto. It would also provide standing to challenge legislative provisions not affected by, or subject to, a legislative veto, a reach of *Chadha* not only inconsistent with the principle enunciated in that case, but also raising serious Article III standing concerns.

Petitioners would require the Court to substitute for the expressed intent of Congress speculation that Congress was willing to abandon such an expressed intent in the face of the fear of a Presidential veto and the inability to override the veto. In essence, such an extension of *Chadha* would substitute the *perceived intent* of the *President* for the *expressed intent* of the *Congress*.

Finally, Petitioners seek in the alternative to give effect to two legislatively vetoed decontrol provisions in a situation in which, *inter alia,* (i) the decontrol proposals were clearly not within the statutory contemplation but rather proposals for new legislation, and where (ii) the decontrol proposals were retroactively withdrawn by legislation signed by the President.

Inasmuch as these Respondents believe that, since *Chadha* is not applicable, the issue of retroactivity cannot be addressed by the Court and inasmuch as it is contemplated that the issue of retroactivity will be adequately briefed by other Respondents, this brief will concern itself principally with the basic inapplicability of the

Chadha principle to invalidate the mandatory regulation of crude oil production.

Respondents will also note briefly the lack of merit in Petitioners' attempt to obtain effectuation of two decontrol provisions not authorized by statute, and of decontrol provisions never submitted.

III.

ARGUMENT

A. The *Chadha* Rule is Inapplicable to the Instant Case: Both as a Matter of Congressional Intent, and as a Matter of Law, a Provision for Legislative Veto of Decontrol Provisions Does Not Provide a Basis For Challenging Mandatory Price Regulations Not Subject to Legislative Veto.

The crude oil price controls, limiting the price which could be charged for domestic crude oil on first sale, are the target of the Petitioners in the *Department of Energy Stripper Well Exemption Litigation, supra.* It is those controls which the Petitioners violated and which they have tardily sought to invalidate. These price controls, mandated by the EPAA, through its original expiration date, February 28, 1975, by virtue of three extension amendments to December 15, 1975 (*See,* Pub. L. No. 93-511, 88 Stat. 1608 (1974); Pub. L. No. 94-99, 89 Stat. 481 (1975); Pub. L. No. 94-133, 89 Stat. 694 (1975), and thereafter, by the extension of the EPAA through the EPCA, were not subject to legislative veto.

Until the enactment of the second of those three EPAA extensions on September 29, 1975 (retroactive to August 31, 1975), the President had the power, subject to legislative veto, to "prescribe an amendment" to those mandatory regulations, exempting "crude oil . . . from such regulation for a period of not more than 90 days."

(EPAA, Section 4(g)(2)).[2] The EPCA formally eliminated the President's power to propose temporary decontrol of crude oil, and provided for a gradual increase in the price of crude oil beginning February 1976, and acceleration of such ceiling price increases by Presidential proposal, subject to a legislative veto. Appendix G to the Petition, pp. 160a *et seq.*

1. *The EPAA — Congressional Intent*

The price regulations, including most particularly the control of crude oil prices, were mandated by a Congress which, as Petitioners correctly note "believed that the national energy crisis required the prompt enactment of a statute mandating the imposition of controls" and which "recognized that the President's opposition to mandatory controls was strong." (Petition, at 18). Indeed, both the House and Senate versions of the EPAA, containing the mandate of price controls but without any Presidential decontrol authority, passed by overwhelming margins, 337 to 72 in the House and 85 to 10 in the Senate. (119 Cong. Rec. 34,477; 119 Cong. Rec. 18,064 (1973).

The Presidential decontrol authority and the accompanying right of Congress to veto its exercise were added in the Conference Committee, 119 Cong. Rec. 36,866 (1973) and, as Petitioner's acknowledged, "the EPAA's *decontrol* provisions would not have been passed by Congress without the legislative veto provisions." (Petition, at 19, emphasis supplied.)

Why the Congress added the Presidential decontrol authority and the legislative veto of such authority is a matter of speculation, and indeed some mystery. Congress clearly had the apparent votes necessary to over-

2. The provision permitting Presidential proposed crude oil decontrol was effectively eliminated by the agreement of the President and the Congress in the EPAA extension of September 29, 1975, retroactive to August 31, providing that "the status quo shall be maintained and the President shall institute no major change in petroleum pricing policy. . . ."

ride a veto, and indeed in the only cited reference to a possible veto in the Congressional debate (cited by Petitioners in their Brief below but omitted from the Petition for Certiorari). Representative Robison, after noting that the President had announced a mandatory allocation program on October 2, concluded:

> "It would thus appear Mr. Chairman that both administration and the Congress have been moving in their own ways and in their own time frames . . . toward the same position, which leads me to believe that, despite reports to the contrary, *this bill may not be subject to the test of Presidential veto.* 119 Cong. Rec. 34,476 (1973) (emphasis supplied).[3]

Whatever dispute may exist as to whether in *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App.) *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 5, 1984 (No. 84-20)), the Temporary Emergency Court of Appeals was or was not articulating the proper standard of severability and whatever dispute may exist about whether the *Dyke* Court and the Court below were correct in severing the legislative veto and leaving intact the Presidential decontrol provisions, there is no serious question about the Congressional intent with regard to the mandatory price regulations: Congress intended that such be promulgated and enforced.

As this Court has made clear, the statutory provisions for mandatory price regulation, and the statute

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3. The only other "evidence" cited by Petitioners, the Senate's sustaining a veto of a subsequent bill which would have rolled back domestic crude oil prices (Petition, at 18), hardly proves anything about the likelihood either of a veto or of it being sustained as to mandatory price regulations. Indeed, the evidence is to the contrary; the President signed the EPAA containing mandatory price controls, and did not propose their elimination until, and only as a part of, his effort to obtain gradual decontrol in the extension of the EPAA by the EPCA. Indeed, then, he signed a bill which eliminated his authority to propose temporary total decontrol of crude oil prices. EPCA, Section 455.

itself, fall only if "it is evident that the Legislature would not have enacted those provisions which are within its power independently of that which is not." *Chadha, supra,* at 2774, *quoting Buckley v. Valeo,* 424 U.S. 1, 108 (1976) and *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210,234 (1932).

To the contrary, in the instant case, it is indeed evident, *inter alia,* from the overwhelming votes in both the House and Senate approving those mandatory price provisions in earlier versions of the EPAA without either decontrol authority or legislative veto, that Congress would have enacted such provisions without decontrol authority and the attendant legislative veto.

Indeed, Petitioners do not argue to the contrary. The furthest extent of their argument is that Congress was afraid to pass such a statute even though it desired to do so because of fear of (i) Presidential veto, and (ii) an inability to override such a veto. As to such a contention, the evidence is all to the contrary. As to the likelihood of veto, the only Congressional debate reference, cited above, suggested that such was not likely, and more importantly the fact is that the President did sign the EPAA containing the obligation to promulgate mandatory price regulations, with only the right to propose ninety day decontrol and with clear evidence from the Congressional vote on the EPAA that should the President attempt to do so, Congress would exercise its legislative veto. As to the concern about the ability to override a veto, the vote on the House and Senate versions would appear to indicate clearly that the votes existed to override.

Thus, Petitioners' argument requires speculation which is inconsistent with a rational judgment on the part of Congress about its power to work its will.

Moreover, it implicitly treats legislation as the equal right of the President and of Congress, ignoring both Article I's assignment of the legislative function to the Congress and this Court's statement that the test is what the "*Legislature* would" have enacted, had it known that the

legislative veto provision was unconstitutional. *Chadha, supra,* at 2774 (emphasis supplied). Where, as here, presumably both the Congress and the President acted on the mistaken assumption that a legislative veto was valid, it is the evident will of Congress to eliminate the Presidential decontrol authority which must be implemented, not the speculated-upon will of the President to veto the entire bill absent his right to decontrol. To do otherwise would impermissibly assign the legislative function to the executive by recognizing his will as superior to that of the Congress.

The proper application of the test of the Congressional intent as enunciated in *Chadha, supra,* and in *Consumer Energy Council of America v. F.E.R.C.,* 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd,* 103 S. Ct. 3556 (1983) would strike both the legislative veto *and* the decontrol authority subject to it, leaving intact the mandatory price regulations and in particular the crude oil price regulations which "injured" Petitioners. Such a result would be consistent with the decisions in two cases upon which Petitioners rely, *McCorkle v. United States,* 559 F.2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978) and *American Federation of Government Employees v. Pierce,* 697 F.2d 303 (D.C. Cir. 1982). In those cases the courts struck down both the Congressional right to act without a full legislative enactment and the executive power or prohibition to which it was attached. And in both cases, the severance of the executive action or limitation and the Congressional power left intact the underlying statutory provisions. In the *McCorkle* case, the statutory provisions establishing federal pay scales and a related provision limiting certain civil service salaries were enforced. In the *Pierce* case, an appropriation to the Department of Housing and Urban Development was upheld. In neither case, does the Court engage in speculation about what Congress would have intended with regard to the remaining provisions had it feared Presidential veto and an inability to override.

2. *The EPCA — Congressional Intent*

If it was possible for Congress to express its intent to mandate crude oil price controls even more clearly than it did in the EPAA, it did so in the EPCA. For although providing for limited increased crude oil prices over time and permitting Presidential proposed acceleration of such price increases subject to legislative veto, it removed the President's previously existing power to propose total decontrol of crudeoil, even temporarily.

Whether the Congressional intent is best effectuated by severing both the legislative veto provisions and the accelerated decontrol provisions subject to the legislative veto, or merely by severing the legislative veto, is a more difficult question than in the case of the EPAA. Arguably, the Congress might have been willing to extend the more limited decontrol authority provided by the EPCA to the President even without a legislative veto, having prohibited full crude decontrol.[4]

The issue whether to strike the legislative veto alone, or the veto and accelerated decontrol provisions together,

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4. On the one hand, as Petitioners note (Petition, at 20), both the Senate and House reports stressed the importance of the legislative veto provisions and the Senate had specifically voted to retain veto powers, all of which suggest that accelerated decontrol of crude oil and optional decontrol of refined products might not have been permitted absent a legislative veto. The elimination of a severability clause in the Conference Committee (Petition, at 21) similarly supports the inseverability of the Presidential power and the legislative veto; had such a provision remained it could have been used to sever the veto only. On the other hand, since the legislation looked to limited increased crude oil prices within its mandatory provisions, an argument can be made that the acceleration of such was consistent with Congressional intent, even absent a legislative veto. Moreover, a holding that the Presidential optional decontrol provisions as to refined products should be severed together with the legislative veto to which they were subject would create a potential in other cases for claimants to assert that they were injured by such accelerated or earlier decontrol of refined products and might subject Petitioners here in their capacity as refiners of product to overcharge claims.

is not however one which requires resolution, since it is clear that under no circumstances did Congress intend to abandon mandatory crude oil price controls, which are the only provisions under this statute which Petitioners seek to invalidate. They can assert no injury from a legislative veto of proposed accelerated decontrol since there were no such vetoes. Nor do they even suggest any instance in which the President was deterred from proposing crude oil price decontrol by the threat of veto; indeed they could not since the EPCA removed the possibility of proposed full decontrol of crude oil.

As to the speculation that Congress "intended", even though it did not desire, to extend to the President accelerated decontrol authority for fear of veto and inability to override had such not been provided, the argument is far more speculative even than when made in connection with the passage of the EPAA. What the President had demanded in his proposals to the Congress in connection with the drafting of the EPCA, made in the form of a thirty month decontrol proposal under the EPAA, 40 Fed. Reg. 30,030, 30,035-36, and then in a thirty-nine month decontrol proposal, 40 Fed. Reg. 31,741 was a foreseeable end to control and some relaxation of controls through the period, and that is what the Congress passed in the EPCA (Appendix G to Petition, pp., 160a *et seq*). Since the provisions of the EPCA not subject to legislative veto met the President's basic demands, there is no reason why Congress should have feared a Presidential veto; indeed his acceptance of a ban on even temporary full decontrol of crude prices and his acceptance of very strict legislative veto provisions as to increasing crude prices and decontrol of refined products suggest the contrary. As to the fear of inability to override a veto, nothing can be drawn from the vote (Petition, at 20) since all votes were on bills already containing the presidential decontrol authority and the legislative veto; indeed, both in the House and Senate the votes in favor of the legislation after conference were fewer than before, indicat-

ing that as the legislation was weakened it had less support, and raising the possibility that had it been strengthened to remove decontrol authority in the President it might have picked up enough strength to permit override. 121 Cong. Rec. 9868, 29,852, 40,735, 41,196 (1975).

3. *A Possibility Of Legislative Veto Which Does Not Reach Mandatory Price Regulations Provides No Basis For Their Invalidation As A Matter Of Logic And Law.*

An alternative analysis which reaches the same result as that discussed above concerning Congressional intent rests upon the recognition that the challenged legislative veto does not extend to the mandatory price controls which Petitioners seek to challenge, but only to actions relieving the regulated from the impact of such controls. Both fundamental Article III principles of standing and simple logic insulate from attack the mandatory price regulations where the complained upon legislative veto does not reach them. As a matter of logic the only injury related to a legislative veto can stem from either the legislative veto itself (in the case of those who would be benefitted by decontrol) or from the decontrol provision (in the case of those who would be harmed by decontrol, *i.e.*, the protected public). Put in traditional proximate cause terminology, the injury which Petitioners allegedly suffered as a result of the existence of the legislative veto was the exercise or failure to exercise the decontrol authority; the veto is no more logically connected to the mandatory price regulations than it would be if the decontrol authority and the related veto were the subject of separate legislation.

Article III principles of standing compel the same results. As this Court has recently summarized the applicable three part test of standing, it requires "the party who invokes the Court's authority to show that he personally has suffered some actual of threatened *injury as a result of the putatively illegal conduct of the defend-*

ants and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted) (emphasis supplied). *See also, Warth v. Seldin*, 422 U.S. 490 (1975). "Injury" from the mandatory price regulations, the real complaint of Petitioners, does not stem from the legislative veto or even from the decontrol authority subject to such legislative veto. Accordingly, injury from the mandatory price regulations cannot be reached in a challenge to the legislative veto. The legislative veto provides no standing to Petitioners to do so.

As already noted, the limit of the reach of a challenge to a legislative veto was implicitly recognized in *McCorkle v. United States, supra,* and in *American Federation of Government Employees v. Pierce, supra,* where the Courts limited their consideration to the Congressional non-legislative action and the executive actions or limitations subject thereto, never even considering the basic statutory provisions as being under attack by virtue of the challenge. And, even closer in point, two District Courts in which an attempt was made to reach the mandatory price regulations of the EPAA through an attack on the constitutionality of the legislative veto have recognized the standing barrier and rejected the attacks. *Citronelle-Mobile Gathering, Inc. v. Gulf Energy Corp.*, 420 F. Supp 162 (S.D. Ala. 1976), *remanded on other grounds*, 578 F. 2d 1149 (5th Cir. 1978), *appeal dismissed on other grounds* 591 F. 2d 711 (Temp. Emer. Ct. App. 1979), *cert. denied*, 444 U.S. 879 (1980); *United States v. Exxon Corp.*, 4 Energy Mgmt (CCH) ¶26,447 (D.D.C. August 29, 1983), *appeal pending*, No. DC-93 (Temp. Emer. Ct. App.). It is true that in the recent TECA decision in *Dyke, supra,* and in the instant matter, the court fails to invoke the standing barrier, instead merely finding that the legislative veto provisions in the EPAA and EPCA may be severed from the presidential decon-

trol provisions. However, such a finding made it unnecessary to consider the issue of whether the challenge to the veto reaches the mandatory price regulations, an issue which becomes relevant only when the Court finds the legislative veto and the presidential or executive actions inseverable, as in *Pierce* and *McCorkle, supra.*

In no case to the knowledge of these Respondents has the principle of *Chadha* been applied to strike statutory provisions not subject to legislative veto. To do so here, particularly in the face of a clear Congressional intent to the contrary, would subvert, not implement, the *Chadha* rule and would require the Courts facing the *Chadha* issue to determine not what Congress intended but rather what Congress believed it had the power to accomplish legislatively in the face of possible Presidential veto. This is hardly a case in which the Court might properly explore the "full range of issues regarding the scope and application" of *Chadha.* (Petition, at 3).

B. Even If The Legislative Veto Alone Is Properly Severed From The EPAA and EPCA, Petitioners Cannot Benefit From The Two Crude Oil Phase-Out Amendments Actually Proposed Nor From Those Which Might Have Been Proposed But Were Not.

Petitioners' arguments seeking to give effect to two proposed crude oil phase out amendments which were proposed by the President and to others which were never made at all depend upon the severability of the legislatively veto alone. (Petition, at 22-28). If, on the other hand, as these Respondents argue, the proper severance under the EPAA (and possibly under the EPCA) is of both the Presidential decontrol provisions and the legislative veto to which they were subject, then (i) neither the two phase out amendments, (ii) nor any amendments which might have been made, can be given effect because the statutory authority for their promulgation has been eliminated. Moreover, with regard to a the EPCA, any amendments

which might have been proposed, but were not, could not have resulted in decontrol of crude oil because the statute did not allow such proposals.

But even if severance is of the legislative veto power alone, leaving intact the Presidential decontrol authority, as the Court below has suggested, neither the two phase out amendments to the EPAA actually made and vetoed legislatively nor some ephemeral amendments to either statute which might have been made, but were not, can be properly given effect.

1. *The Two Phase-out Crude Oil Amendments Were Null And Void* Ab Initio *Since They Were Not Within The President's Statutory Authority.*

As the August 31st date for the expiration of the EPAA approached, with the President seeking decontrol of crude oil and the Congress desiring to continue to control, the President proposed a compromise — decontrol on a phase-out basis. The vehicle for his legislative proposals was ostensibly EPAA Section 4(g)(2), a provision permitting him to propose decontrol entirely of crude oil for a "period of not more than 90 days." Presumably, the reason for so submitting his legislative proposals is that the time limit on the exercise of a legislative veto assured, and indeed obtained, a prompt response from Congress. His thrity-month decontrol proposal was submitted on July 16 and rejected by Congress on July 22 (40 Fed. Reg. 30,030, 30,035-36 (1975); 121 Cong. Rec. 23,983-84 (1975)). His longer thirty-nine month phase-out proposal was submitted July 25, 1975 (40 Fed. Reg. 31,741 (1975)) and also was rejected promptly on July 30, 1975. (121 Cong. Rec. 25,881-82 (1975)).

That what the President intended in his decontrol "amendment" proposals was actually new legislation is clear from his assurance to Congress in urging action on the 30 month phase-out that it was part of a package including a windfall profits tax, import fees and rebates to consumers, (Veto of a Petroleum Price Review Bill, II

Pub. Papers of President Ford 1007 (July 21, 1975)) and from the Federal Energy Administrator's assurance in a press conference to the same effect in connection with the thrity-nine month phase-out proposal. (Appendix I of Petition, pp. 312a *et seq.*). Such assurances also included, and indeed required because of the length of the proposed phase-out, the President's agreement to an extension of the EPAA.

The phase-out amendments did not comply with the statutory requirements because:

(i) They were not proposals for "*exempting* such oil (crude) from such regulation," both because (a) the statute contemplated *full* exemption and the "amendment" was for gradual decontrol and (b) the statute contemplated that the deregulation would be of both price and allocation regulation, and the "amendment" "would not affect the crude oil allocation regulations," 40 Fed. Reg. 30,030, July 16, 1975. Indeed, the finding required by statute "that there is no shortage of such (crude) oil," and made by the FEA, would clearly appear to require both immediate total exemption, and that such be from allocation as well as price regulation. 40 Fed. Reg. 30.031, 31,742.

(ii) They were not proposals "for a period of not more than ninety days." One was for thirty months, and the other for thirty-nine months. The statute clearly contemplated limiting suspension of the regulations so as to require a fresh look at the underlying supply situation; the "amendments" did not so provide.

(iii) They were inconsistent with the statute under which they were promulgated in extending beyond the period of its authority, August 31, 1975. The thirty-month proposal would presumably become effective on or about July 23 after passage of

the legislative veto period (40 Fed. Reg. 30,030), while the thrity-nine month proposal would not be effective until Sept. 1 (40 Fed. Reg. 31,746), a day after the authority under which it was promulgated expired. Clearly the statutory authority was only to propose "amendments" which began and ended within the limit of the statute, August 31, 1975; neither did so, only the first being within the statutory expiration period at all and then only for a little more than one month of its thirty month duration.

2. *The President Agreed Retroactively To The Elimination Of The "Amendments" From The Regulatory Scheme.*

In his veto of a six month extension of the EPAA September 9, 1975 following rejection of his two phase-out "amendments" the president agreed to "accept a 45 day extension of price controls to provide time to work with Congressional leaders . . . (to) seek an acceptable compromise." Veto of a Bill to Extend Domestic Oil Price Controls II Public Papers of President Ford 1354 (September 9, 1975). What the President clearly contemplated, and what the extension he signed provided, was that "during the period of this extension . . . the status quo shall be maintained and the President shall institute no major change in petroleum pricing policy under section 4(g)(2) . . ." 89 Stat. 481. That extension, signed by the President on September 29, was explicitly retroactive to August 31, and clearly represented an understanding by the President that his prior proposed "amendments" were to be considered null and void, from the date of their submission.

Moreover, the retroactive elimination of the effects of any such "amendments" was confirmed, if any confirmation was needed, by the President's approval of the EPCA on December 22, 1975. The development of a maximum weighted average first sale price of $7.66, the adjustments for inflation and as an incentive for production

(EPCA Section 401) and most explicitly the express elimination of total decontrol authority as to crude oil first sale (EPCA Section 455) all reflected a Presidential understanding that the "amendments" of July, 1975 were considered to be of no effect. (Appendix G of Petition, pp. 160a *et seq.*)

3. *No Effect Can Be Given To Phase-out Amendments Which Were Never Proposed To The Congress.*

Petitioners' argument that if the legislative veto provisions are severed effect must somehow be given to what the President would have proposed had he been unfettered by the threat of veto is of no merit for two simple reasons. First, there is no way to predict either what the President would have proposed, nor more importantly what Congress would have done in reaction to such proposals had they been made and not been subject to the legislative veto. Accordingly, there is no way to give effect to proposals not made and legislation not passed in response thereto.

Second, there is no legal basis for giving effect to regulations not proposed and petitioners were able to cite none. The case they cite, *Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983) holds only that regulations *actually* promulgated should be stricken if improperly affected by the exercise of an unconstitutional veto. Similarly, in *Texas Medical Association v. Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976), the Court was invalidating actually promulgated regulations because of undue Congressional pressure.

Indeed, the only possible application of the principle of those cases to the instant situation would provide an additional reason for the invalidation of the thirty and thirty-nine month crude oil phase-out amendments, to wit, that their submission rather than the more rapid

phase-out originally contemplated by the President was improperly influenced by the threat of a legislative veto and they should therefore be disregarded.

4. *Effectuation Of Crude Oil Decontrol At The President's Instance Could Not Have Been Accomplished Without Formal Congressional Action.*

It is significant that not only were the mandatory price regulations as promulgated by the President not subject to legislative veto, but indeed that the President had the right to amend such regulations to increase the price ceilings, without facing legislative veto, provided only that he did so in accordance with the statutory standards. *Consumers Union v. Sawhill,* 525 F.2d 1068 (Temp. Emer. Ct. App. 1975).

Inferentially, any proposed decontrol by the President, made or which might have been made, represented an acknowledgement that such was beyond the contemplation of the statute and was indeed not a regulatory proposal at all but rather a proposal for new legislation. As such, whether or not legislatively vetoed, it could not become law without formal legislative action, including concurrence of both houses of Congress, pursuant to Article I of the Constitution.

To give effect to a decontrol proposal without such Congressional concurrence would as much countenance an interference by the President with Congressional power, as did the Congressional action in *Chadha* represent an interference by Congress with the Presidential power.

IV.
CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certriorari be denied.

Respectfully submitted,

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